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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TEPM, 1962.

No. 881.

FEDERAL PACIFIC ELECTRIC COMPANY and
GENERAL ELECTRIC COMPANY,
Petitioners,

vs.

CITY OF KANSAS CITY, MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION OF UNION ELECTRIC COMPANY FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

Comes now Union Electric Company, a Missouri corporation, and respectfully moves this Court for leave to file the within brief in this case as amicus curiae. The interest of Union Electric and its reasons for asking for leave to file a brief in opposition to the petition for writ of certiorari are set forth below.

Movant is a corporation duly organized and existing under the laws of the State of Missouri and engaged in the business of generating electricity and furnishing electric service to the public in the states of Missouri, Illinois and Iowa. Union Electric has filed eight complaints in the United States District Court for the Eastern District of Missouri, Eastern Division, against various suppliers of electrical equipment, including petitioners General Electric and Federal Pacific Electric Company, seeking treble damages under the antitrust laws of the United States by reason of overcharges in the sale by the named defendants to Union Electric of various types of electrical equipment. Defendants in each of Union Electric's cases, and also in twenty-five other cases pending in the District Court for the Eastern District of Missouri, have filed motions to dismiss or, in the alternative, for summary judgment which are almost identical to the ones filed by petitioners in the case at hand. These motions seek a ruling that the doctrine of fraudulent concealment is not applicable to the statute of limitations contained in Section 4B of the Clayton Act (15 U. S. C., § 15 b), the same legal issue which is presented in the case at bar. These motions were argued before the Honorable Roy W. Harper, Chief Judge, on July 13, 1962, and no ruling has been made as of this date.

Union Electric has a vital interest in the case at hand since it will have direct applicability to the eight cases of Union Electric presently pending before Chief Judge Harper. Movant believes that the decision below is clearly correct, that it is in accord with previous decisions of this Court, and that there is a unanimity of opinion on this matter by all appellate courts. For these reasons, movant believes there is no basis upon which to grant certiorari or, if this Court believes certiorari should be granted because of the many cases pending across the country in

volving the same issue, then the decision below should simply be affirmed *per curiam* and without oral argument.

Movant therefore desires to present its viewpoint by an amicus curiae brief in opposition. It is felt that such a brief in opposition is particularly appropriate in this case since the respondent is not opposing the petition and since movant believes that the Court should have the benefit of what movant believes are valid arguments in opposition to the granting of the petition for writ of certiorari.

Respectfully submitted,

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vs.

CITY OF KANSAS CITY, MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF UNION ELECTRIC COMPANY, AMICUS CURIAE, IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 310 F. 2d 271, and is attached to the petition. The opinion of the United States District Court for the Western District of Missouri is reported at 210 F. Supp. 545.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit were entered on November 6, 1962. A petition for rehearing was denied on November 30, 1962. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Is the doctrine of fraudulent concealment applicable to anti-trust actions so as to toll the statute of limitations provisions contained in Section 4B of the Clayton Act (15 U. S. C., § 15b)?

STATUTES INVOLVED.

Clayton Act, Section 4, 15 U. S. C. § 15 (1914). **Suits by persons injured: amount of recovery:**

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 4B, 15 U. S. C. § 15b (**effective** January 7, 1956). **Limitation of actions:**

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and

sections 15a and 16 of this title shall be revived by said sections."

Clayton Act, Section 5 (b), 15 U. S. C. § 16 (b) (as amended July 7, 1955). Judgment in favor of Government as evidence; suspension of limitations.

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: **Provided, however**, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

STATEMENT.

The facts giving rise to the sole issue in this case are simple and undisputed. In April, 1962, respondent filed complaints seeking treble damages under Section 4 of the Clayton Act (15 U. S. C., § 15) by reason of conspiratorial overcharges in the sale in 1954 by the named petitioners to respondent of specified types of electrical equipment. Respondent's complaints contain allegations that petitioners fraudulently concealed the existence of these conspiracies from the respondent and others and that respondent did not learn of the existence of said conspiracies until after commencement of the government criminal and civil proceedings against petitioners in 1960. It is also alleged that the criminal proceedings have terminated but that the civil proceedings are still pending.

Petitioners filed motions seeking: (1) an order of dismissal pursuant to Rule 12 of the Federal Rules of Civil Procedure; or (2) in the alternative, a judgment of dismissal pursuant to Rule 56 of the Federal Rules of Civil Procedure. The basis for the motions was that each complaint showed on its face that respondent's claims were barred by the applicable four year statute of limitation (Sec. 4B of the Clayton Act, 15 U. S. C., § 15b). The petitioners' motions did not contest the sufficiency of respondent's allegations of fraudulent concealment. These allegations were as follows:

> B. From the inception of the combination and conspiracy between defendants described in paragraphs 9, 10 and 11, which was at least as early as January 1, 1948, and continuously thereafter until at least May 25, 1960, defendants resorted to and maintained in effect various procedures and means for the purpose of concealing the existence of their conspiracy. These included secret meetings of officers and employees of

the defendants at various places in the country, the placing of telephone calls to and from the residences of company representatives rather than their offices, the use of public pay telephones, the use of plain envelopes addressed to the homes of such representatives without any return addresses or other means for identifying the senders, and the concealment or destruction of records respecting the conspiracy. During all of the period of time mentioned above, defendants established and used a scheme or formula designated the "phase of the moon" or "light of the moon" formula, for quoting nearly identical prices to electrical utility companies and municipal corporations, including plaintiff. Code numbers identifying the defendant corporations were used in documents effectuating said "phase of the moon" formula. Through the cyclic rotating positioning inherent in said formula, one defendant corporation would quote the low price, others would quote intermediate prices, and another would quote the high price. These positions were periodically rotated among the defendant corporations and said formula was so calculated that in submitting prices to electrical utility companies and municipal corporations, including plaintiff, the price spread between defendant corporations would be sufficiently narrow so as to eliminate actual price competition among them but sufficiently wide so as to give an appearance of competition. Said formula was designed to permit each defendant corporation to know the exact price it and every other defendant corporation would quote on each prospective sale. By the use of said formula and other means defendants rigged price quotations and bids to purchasers, including plaintiff, and so represented their prices to plaintiff as to give the appearance of competitive bidding and pricing and by such means caused plain-

> tiff to believe that it was receiving competitive prices. By such means and through other deliberate acts defendants from the inception of said conspiracy and continuously thereafter until at least May 25, 1960, fraudulently concealed the existence of their combination and conspiracy and plaintiff had no knowledge, nor could it by the exercise of reasonable diligence have obtained knowledge, of the existence of said combination and conspiracy until after the institution of the proceedings described in paragraph 12.

The District Court, on July 16, 1962, sustained petitioners' motions. On appeal, the Court of Appeals for the Eighth Circuit (opinion by Judge Matthes) unanimously reversed. The Court held that Congress was well aware of this Court's long line of cases holding that the federal doctrine of fraudulent concealment "is read into every federal statute of limitations" (**Holmberg v. Armbrecht**, 327 U. S. 392, 397 (1946)), when, in 1955, it passed the limitations provison contained in Section 4B of the Clayton Act, and that Congress specifically and intentionally wanted the doctrine to be read into Section 4B (see petition at pages 32-33). The Court of Appeals concluded that, contrary to petitioners' contentions, Congress clearly had not "meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized" (Petition at page 45).

ARGUMENT

I.

THERE IS NO SPECIAL OR IMPORTANT REASON TO REVIEW THE DECISION BELOW.

As pointed out in Point II of this brief, *infra*, the decision below is clearly correct. It is in accord with a long line of cases decided by this Court and represents the considered opinion of all Courts of Appeal which have been presented with the question of the applicability of the doctrine of fraudulent concealment to antitrust actions. It is true that the petitioners here have been sued in some 1,800 cases across the country for antitrust violations and have decided to raise this issue in each and every case. It does not follow, however, that petitioners may create a federal issue of importance by the mere expedient of raising an issue in all of the many cases in which they have been sued. By petitioners' reasoning they have the power to create a federal question calling for review by this Court simply by raising an issue in their cases and regardless of merit of that issue.

Here, as in all antitrust actions, there will be many issues raised at one point or another during the course of pretrial motions and discovery. Petitioners may not delay this litigation interminably by bringing each issue up, one at a time, through each and every appellate court. Such a tactic not only will exacerbate, rather than simplify, the work load of the federal courts, but it will also delay plaintiffs' right to have a speedy trial and an ultimate disposition of these cases.

It is particularly inappropriate for petitioners to attempt to delay this litigation by seeking review in this Court of the question of the applicability of the doctrine of fraudulent concealment to the statute of limitations in antitrust

actions. Not only has this Court held that the doctrine is applicable to all federal statutes of limitation, but also the Federal Courts of Appeal are unanimous in their view that the doctrine applies to the limitations provision in Section 4B of the Clayton Act. (See Point II, *infra*.) Such a result seemed so clear to the Court of Appeals for the Second Circuit recently that it disposed of the issue by a *per curiam* opinion. **Atlantic City Electric Co. v. General Electric Co.**, 312 F. 2d 236 (2d Cir. 1962).

It is respectfully suggested that if this Court believes that it should make a final ruling on the issue here involved, the petition for writ of certiorari should be granted and the decision below **affirmed** *per curiam* with a reference to **Holmberg v. Armbrecht**, 327 U. S. 392 (1946), and **Bailey v. Glover**, 88 U. S. (21 Wall.) 342 (1875). Such a procedure would not be without precedent. Many times this Court has granted certiorari and reversed *per curiam* where the issue is clear and prior decisions of the Court have authoritatively ruled the question presented. See, *e. g.*, the decisions of this Court last term in **McMahon v. Milan Mfg. Co.**, 368 U. S. 7 (1961); **Harvey v. Smyth**, 369 U. S. 152 (1962); **Byrnes v. Walker**, 369 U. S. 436 (1962); **Winters v. Ohio**, 370 U. S. 721 (1962); and **Hartman v. United States**, 370 U. S. 724 (1962).

II.

THE DECISION BELOW IS CLEARLY CORRECT.

A.

This Court Has Read the Doctrine of Fraudulent Concealment Into Every Federal Statute of Limitations.

Bailey v. Glover, 88 U. S. (21 Wall.) 342 (1875), is the landmark case for the application of the doctrine of fraud-

ulent concealment. There the representative of a bankrupt estate filed suit three years after his appointment to set aside certain alleged fraudulent conveyances to relatives of the bankrupt. Plaintiff alleged that the secrecy and the fraudulent concealment of these transfers prevented assignees and creditors from learning of the fraud until the applicable statute of limitations had run. Defendants demurred and set up the statute of limitations as a defense. The applicable statute under the Bankruptcy Act of 1867, 14 Stat. 526, provided, in part:

> "(B)ut no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property or rights of property aforesaid in any Court whatsoever unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee" (Section 2).

The demurrer was sustained and the case was appealed to the Supreme Court.

This Court was squarely presented with the question whether the fraudulent acts by the bankrupt tolled the statute of limitations. Mr. Justice Miller speaking for the Court, answered in the affirmative:

> "(W)e hold that when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." 88 U. S. (21 Wall.) 350.

Since the **Bailey** decision, this Court has applied the doctrine of fraudulent concealment enunciated in **Bailey** in

a number of other cases involving different fact situations. See, e. g., **Traer v. Clews**, 115 U. S. 528 (1885); **Rosenthal v. Walker**, 111 U. S. 185 (1884); **Exploration Co. v. United States**, 247 U. S. 435 (1918); and see also **United States v. Diamond Coal & Coke Co.**, 255 U. S. 323 (1921).

Recently, the doctrine of fraudulent concealment was applied in **Holmberg v. Armbrecht**, 327 U. S. 392 (1946), an action in equity under the Federal Farm Loan Act. Defendant contended that the suit was barred by the applicable statute of limitations. Plaintiff argued that the statute was not a bar because defendant's own actions had prevented the plaintiff from bringing suit within the applicable period of time. Once again the doctrine of fraudulent concealment was applied. Mr. Justice Frankfurter, speaking for a unanimous Court, stated:

> ". . . (T)his Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute (of limitations) does not begin to run until the fraud is discovered . . .' **Bailey v. Glover**, 21 Wall. 342, 348, and see **Exploration Co. v. United States**, 247 U. S. 435 . . . ." (327 U. S. at 397, 65 S. Ct. at 585.)

Moreover, the Court did not limit its decision to a holding that the doctrine of fraudulent concealment applied only to the statute of limitation applicable to the Federal Farm Loan Act. Specifically, the Court stated:

> "**This equitable doctrine is read into every federal statute of limitation.**" (327 U. S. at 397, 66 S. Ct. at 585.)

This ruling in itself is dispositive of the issue involved in this case, and the fact that this Court has, in every case decided by it, applied the doctrine of fraudulent conceal-

ment to a federally created right or to a federal statute of limitations leaves no room for doubt that the doctrine is, indeed, "read into every federal statute of limitation," including Section 4B of the Clayton Act. See, also, **Glus v. Brooklyn Eastern District Terminal**, 359 U. S. 231, 79 S. Ct. 760 (1959).

B.

The Courts of Appeal Have Consistently Applied the Doctrine of Fraudulent Concealment in Private Antitrust Actions Both Before and After the Enactment of Section 4B.

The doctrine of **Bailey** and **Holmberg** has always been applied in private antitrust actions. As early as 1913, the Court of Appeals for the Fifth Circuit, in the case of **American Tobacco Co. v. Peoples Tobacco Co.**, 204 Fed. 58 (1913), followed the mandate of the **Bailey** case and applied the doctrine of fraudulent concealment to an action brought under the Sherman Act. In so doing, the Court stated:

> "It must be borne in mind that the cause of the wrongful conduct, injurious to the plaintiff, was all this time concealed from the plaintiff, and this conduct and this concealment must necessarily be considered as a fraud on the plaintiff."

The decision in **American Tobacco** has been reaffirmed in subsequent private antitrust actions. For example, in **Crummer v. DuPont**, 255 F. 2d 425 (5th Cir., 1958), the Court held that the doctrine of fraudulent concealment was applicable to an antitrust action and that the question of fraudulent concealment was for the jury to determine on proper instruction by the Court.

In cases which have interpreted Section 4B since its enactment, it has been unanimously held by the Courts

of Appeal that the doctrine of fraudulent concealment applies so as to toll the running of the statute. In addition to the decision below, the Court of Appeals for the Second Circuit, in a *per curiam* opinion, recently made precisely the same ruling, citing both the decision in the case at hand and the Second Circuit's prior decision to the same effect in **Moviecolor, Ltd. v. Eastman Kodak Co.**, 288 F. 2d 80 (2d Cir., 1961). See **Atlantic City Electric Co. v. General Electric Co.**, 312 F. 2d 236 (2d Cir., 1962). Thus, not a single appellate court which has considered the matter has ruled that, for some reason, the doctrine of fraudulent concealment is not applicable to antitrust actions. Rather, the courts have followed this Court's unequivocal statement that "this equitable doctrine is read into every statute of limitation." **Holmberg v. Armbrecht**, 327 U. S. 392, 397 (1946). On March 15, 1963, the Tenth Circuit also made the same ruling as the Court below, Public Service Co. of New Mexico v. General Electric Co, et al, No 7140 C.

The Legislative History Shows That Congress Intended the Doctrine of Fraudulent Concealment to Be Applicable to Section 4B.

As the Court below pointed out, the legislative history clearly shows that Congress intended that the Courts apply the doctrine of fraudulent concealment to Section 4B (Petition at page 33). Such legislative history concerning the applicability of the fraudulent concealment doctrine to this statute is short and to the point and is contained primarily in two statements by Mr. Celler, Chairman of the House Judiciary Committee and floor manager of H. R. 4954. Congressman Celler not only introduced H. R. 4954[1] but he was Chairman of the subcommittee that reported the bill.[2] In this capacity, Congressman Celler's statements are authoritative.

[1] 101 Cong. Rec. 2977 (1955).

[2] 101 Cong. Rec. 5129 (1955).

See **Mitchell v. Kentucky Finance Co.**, 359 U. S. 290 (1959); **United States v. St. Paul, Minneapolis & Manitoba Railway**, 247 U. S. 310 (1918); **Ideal Farms, Inc. v. Benson**, 288 F. 2d 608 (3rd Cir., 1961); and **H. W. Robinson Air Freight Corp. v. United States**, 188 F. Supp. 745, 751 (Cust. Ct., 1960).

H. R. 4954 was passed by the House as reported from the Committee on the Judiciary without amendment. Except for a brief explanation by Senator Kilgore, there was no debate in the Senate. The discussions which took place in the House of Representatives, however, reflect Congressman Celler's firm conviction that the doctrine of fraudulent concealment tolled the statute of limitations with regard to Section 4B. The following colloquy between Congressmen Celler and Patman clearly reflects this view:

> "Mr. Patman: Does that 4 years apply to conspiracy cases? Suppose there is a conspiracy, and it is 10 years before the conspiracy is known.
>
> "Mr. Celler: In the case of conspiracy or fraud, the statute only runs from the time of discovery.
>
> "Mr. Patman: From the time of discovery?
>
> "Mr. Celler: In conspiracy cases and cases of fraud.
>
> "Mr. Patman: And it is not the object or intention to change that at all?
>
> "Mr. Celler: That is correct." (101 Cong. Rec. 5129 (1955)).

After Chairman Celler had finished this explanation, Congressman Keating, likewise a member of the judiciary committee, also gave a brief explanation of the necessity for this legislation, and, again, the same question was raised by Mr. Patman:

> "Mr. Patman: Does the gentleman agree with the chairman that the 4-year limitation does not commence to apply in a conspiracy case until the conspiracy becomes known?

"Mr. Keating: I would want to have the law on that checked by the counsel for our committee. I have an impression that there have been decisions under the present conspiracy statute, which is not in any way interfered with by this legislation, to the effect that the statute of limitations does not begin to run until the discovery of the conspiracy. But I would not want to make a positive assertion to the gentleman on that point without further investigation of the law.

"Mr. Patman: Notwithstanding the fact that discovery was made years later?

"Mr. Keating: I would be happy to yield to the Chairman of the committee, who may have investigated that precise point.

"Mr. Celler: Yes, I have. The statute only said from the time of discovery in that kind of case. The basis for my conclusion in that regard is the cases themselves. There are innumerable cases on that score.

"Mr. Keating: I am happy to have that enlightenment." (101 Cong. Rec. 5130 (1955).)

Finally, at the conclusion of the debate, the following exchange occurred:

"Mr. Patman: Mr. Chairman, after the word 'accrued' in line 7, p. 2, I have an amendment prepared to include the phrase 'and became known' so as to make it clear that the cause of action or that limitation would not commence to run against a cause of action until it is discovered, until it became known, and, therefore, I would like to ask the chairman of the committee this question: Is it your understanding, Mr. Chairman, that the cause of action will not commence to run, that limitation will not commence to run on the cause of action until after it is discovered, 4, 6, or 10 years hence?

"Mr. Celler: The statute of limitations will start running from the time the action accrues, not from the time of discovery. If you make it time of discovery, then you practically have no statute of limitations at all. An action could have accrued and the person aggrieved might not have heard of it for 20 years. Under the suggested amendment he would have a right to bring an action after 20 years, after the evidence will have been lost, and the defendant would be put in a rather deplorable situation in that regard. We provide that the 4 year statute shall start to run from the time of the accrual of damages, from the time the wrong is done, not from the time of discovery.

"Mr. Patman: Even in the case of fraud or conspiracy?

"Mr. Celler: No. In the case of fraud or conspiracy the statute of limitations only runs from the time of discovery.

"Mr. Patman: That is the point I wanted to make sure of. You are not attempting to change that particular part of it?

"Mr. Celler: Not at all." (101 Cong. Rec. 5132-33 (1955).)

These emphatic pronouncements by Congressman Celler, Chairman of the Judiciary Committee and sponsor of the bill, leave no doubt that Congress intended the doctrine of fraudulent concealment to be applicable to Section 4B.

Thus, the decisions of this Court, the decisions of the appellate courts and the legislative history of the statute here involved make it clear that Section 4B of the Clayton Act is tolled by acts of fraudulent concealment.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied or, in the alternative, the writ should be granted and the decision below affirmed *per curiam*.

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